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March 31, 2016

BY HAND DELIVERY

Mr. Dan Petalas
Acting General Counsel
Federal Election Commission
999 E Street, NW
Washington, DC 20463

Re: MUR 7022 – Bernie 2016 and Susan Jackson in her capacity as Treasurer

Dear Mr. Petalas:

This response is submitted on behalf of the above-referenced respondents in relation to the March 14, 2016, letter from the Commission notifying both Bernie 2016 and Ms. Jackson of a complaint filed by David Chase, Campaign Manager for Ruben Kihuen for Congress (the "Complaint").

For the reasons set forth below, and pursuant to 52 U.S.C. 30109, the matter should be dismissed.

I. The Ad Is Not A Coordinated Communication Because It Did Not Promote Or Support Lucy Flores' Candidacy

As acknowledged in the Complaint itself, the Commission's coordinated communication regulation includes a safe harbor for public communications that contain an endorsement by other Federal candidates, so long as the ad itself does not *promote* or *support* the endorsing candidate.

Specifically, section 109.21(g)(1) of the Commission's rules provides:

A public communication in which a candidate for Federal office endorses another candidate for Federal or non-Federal office is not a coordinated communication with respect to the endorsing



Federal candidate *unless the public communication promotes, supports, attacks, or opposes the endorsing candidate* or another candidate who seeks election to the same office as the endorsing candidate. 11 C.F.R. § 109.21(g) (emphasis added).

The analysis could not be more simple – the Bernie 2016 television advertisement featuring Lucy Flores (the “Ad”) contained no mention whatsoever that Lucy Flores is a candidate for Federal office. In fact, there is no way for a viewer from watching the Ad alone to even know that Lucy Flores is a candidate. Accordingly, it was not possible for the ad to promote or support Ms. Flores’ candidacy.¹

Moreover, because the Ad did not *promote* or *support* Ms. Flores’ candidacy, there is no way that the Ad was the “functional equivalent of express advocacy,” a far more stringent standard requiring that an ad be “susceptible of no reasonable interpretation other than as an appeal to vote for or against a clearly identified candidate.” 11 C.F.R. § 109.21(c)(5). Again, because the Ad did not even mention Ms. Flores’ candidacy, there is no way that the Ad satisfied the rigorous “functional equivalent of express advocacy” standard.

II. The Ad is Not a Coordinated Communication Because It Did Not Air In The 90-Day Window Applicable to Lucy Flores’ Candidacy

The Ad ran immediately before the Nevada Democratic Presidential Caucus, which took place on February 20, 2016. However, Lucy Flores was not a candidate in the February 20, 2016, presidential caucuses. In fact, Ms. Flores will not appear on the ballot until Nevada holds its Primary elections on June 14, 2016 – a full 115 days after the Nevada Presidential Caucus.²

Accordingly, even if the safe harbor for endorsing candidate discussed above did not exist in the Commission’s regulations, because the Ad was only publicly distributed more than 90 days before Ms. Flores’ upcoming election, it could not have been a coordinated communications under the Commission’s regulation because it does not satisfy the so-called “content prong” of the test set out in 11 C.F.R. § 109.21(c)(4)(i).

¹ See MUR 5718 (Citizens for Giannoulas, *et. al.*), First General Counsel’s Report at Page 7 (“Given that neither of the ads mentions Jackson’s candidacy for federal office, we believe that the same rationale underlying the Commission’s promulgation of § 109.21(g) warrants dismissal here.”) See also Advisory Opinion 2007-34 (Jackson Jr.) (“the mere identification of an individual who is a Federal candidate is not of itself tantamount to promoting, supporting, attacking, or opposing that candidate.”); Advisory Opinion 2006-10 (EchoStar); and Advisory Opinion 2003-25 (Weinzapfel).

² Nevada Secretary of State Website, www.nvsos.gov (election calendar available at <http://nvsos.gov/Modules/ShowDocument.aspx?documentid=3770>).



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III. Conclusion

Because the Ad was not a coordinated communication, Bernie 2016 did not make an in-kind contribution to Flores for Congress, Ms. Flores' authorized campaign committee, and the Complaint should be dismissed.

Respectfully Submitted,

*Brad Deutsch
(per Eric Korman)*

Brad Deutsch
Counsel to Bernie 2016

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